

***U.S. DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NORTHWEST, SUITE 400
WASHINGTON, DC 20001-8002***

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: 01/17/97

CASE NO. 95-INA-324

In the Matter of:

SPECTRUM ANALYTICAL, INC.,
Employer

on behalf of

HANIBAL C. TAYEH,
Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by §212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer, who represented simply that its business is environmental testing, filed an *Application for Alien Employment Certification* (ETA 750A) to permit it to employ the Alien permanently as a Technical Director/Lab Manager with the following duties:

Overall supervision of laboratory, including quality assurance and quality control, revising protocol and methodology, ensuring proper sample response time and marketing.

The Employer indicated that it required any U.S. applicant for the position to have a Bachelor of Science degree in Chemical Engineering and two years experience in the job offered. In the *Statement of Qualifications of Alien* (ETA 750B), which is dated in January 1994 and accompanied the application, it was noted that the Alien had been employed in the position by the Employer since September 1991.

The Employer advertised for the position with the same qualifications as were listed in its ETA 750A. Five resumes were referred to the Employer as a result of its recruitment efforts. These resumes included that of Theresa M. Wolejko, who had over two years experience as a Director of Research and Quality Assurance and whose credentials included providing technical support to marketing, supervision of a wastewater management system and independent studies involving classification of hazardous waste.

The Employer's recruitment report relating to Ms. Wolejko's application consisted of the following handwritten note signed by its president:

"While Ms. Wolejko appears to have substantial experience in chemistry related projects she has limited or no experience in directing an organic/inorganic laboratory, establishing laboratory procedure protocols and QA/QC procedures.

"Ms. Wolejko is not qualified for the position of laboratory Director for Spectrum Analytical, Inc."

The CO issued a Notice of Findings (NOF) in which he proposed to deny certification, on the basis, *inter alia*, that it appeared Ms. Wolejko had been rejected by the Employer for other than lawful job-related reasons in violation of § 656.21(b)(6) of the regulations. The CO noted in this regard that although the Employer had rejected Ms. Wolejko because she lacked experience in directing organic/inorganic established laboratory procedure protocols, such was not listed as job duties or special requirements on the form 750 A.

The Employer's rebuttal addressed the above issue as follows:

With respect to the job duties or special requirements referenced on Form 750 Part A, it appears as though there may have been a misunderstanding regarding the exact specifications for the job. Spectrum's services include organic, as well as inorganic analysis of ground water and soil samples, and to direct these services, the Lab Director must possess a strong, working knowledge in both these disciplines. In retrospect, we assumed that the Department of Labor would recognize these inherent requirements. Since neither applicants possessed these

required backgrounds, [another applicant] and Ms. Wolejko were rejected as candidates.

In a Final Determination, issued on January 9, 1995, the CO found that the Employer had not established that Ms. Wolejko had been rejected solely for lawful job-related reasons and denied certification. Thereafter, the Employer requested an administrative-judicial review of the denial and the record has been submitted to the Board for such purpose. The Employer has based its appeal on the contention that “[d]espite the fact that Ms. Wolejko has excellent credentials in performing the work involved in ‘in-house’ duties, she had no experience in marketing our products.”

On July 24, 1996, the Alien requested an expedited review of the case because of the financial hardship and illness of his father. In support of this motion, the Alien submitted a copy of a Promissory Note evidencing his recent borrowing of \$25,000.00. The Note states that it is secured, in part, “by the Borrower’s ownership, right, title and interest in Spectrum Analytical, Inc.”

DISCUSSION

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and the advertisement for the position. *American Cafe*, 90-INA-26 (Jan. 24, 1991). An employer may not reject a qualified applicant because the alien is more qualified. *K Super KQ 1540-A.M.*, 88-INA-397 (Apr. 3, 1989) (*en banc*).

It is not sufficient that the Department of Labor **assume** that a position involves certain duties. Rather, as held in *American Cafe*, the duties and qualifications must be **specified** in the ETA 750A and advertisement. As found by the CO, the Employer in the instant case has rejected a U.S. Applicant Wolejko for purportedly failing to have experience in directing an organic/inorganic laboratory, establishing laboratory procedure protocols and “QA/QC procedures.” None of these requirements are stated on the ETA-750 or in the job.¹ Accordingly, we agree with the basis for the rejection as set forth in the Final Determination.²

¹We say “purportedly” because it appears from her resume that Ms. Wolejko could very well have experience in the organic and inorganic analysis of groundwater and soil samples. The Employer gives no indication that there was ever an attempt made to interview this apparently qualified candidate to explore her credentials. We note that its failure to do so could have also formed a basis for denial of its application. *Nancy, Ltd.* 88-INA-358 (Apr. 27, 1989) (*en banc*).

²We note that the Employer has stated a new reason for Ms. Wolejko’s rejection in its request for review and appears to concede that its prior basis for rejection was not valid. Not

In any event, we would decline to grant certification in this case because it appears from the Promissory Note attached to the request for expedited review that the Alien has acquired an ownership interest in the Employer. We note in this regard that when an alien, for whom certification is sought, has an investment interest in the employer, the question of whether an employer-employee relationship and a bona fide job opportunity exist may arise. Pursuant to the regulatory definition of employment, the alien must work for an employer other than himself. If the position for which certification is sought constitutes nothing more than self-employment, it does not constitute genuine "employment" under the regulations, and labor certification is barred *per se*. *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*).

ORDER

The Certifying Officer's DENIAL of labor certification in this case is AFFIRMED.

Entered at the direction of the panel

TODD R. SMYTH
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a part petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five,

only does this come too late, but, here again her resume indicates some involvement in marketing which should have warranted further investigation of her credentials by the Employer.

double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.